[ORAL ARGUMENT SCHEDULED FOR NOVEMBER 8, 2018]

No. 18-3052

IN THE

United States Court of Appeals for the District of Columbia Circuit

IN RE: GRAND JURY INVESTIGAITON

ANDREW MILLER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF APPELLANT ANDREW MILLER

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ARGUMENT

I. Congress Has Not "By Law" Vested The Attorney General With Authority to Appoint the Special Counsel as an Inferior Officer.

The principal question before this Court is whether there is any statute that clearly conveys power to the Attorney General to appoint a private attorney as Special Counsel at the level of an inferior officer. The Special Counsel claims that §§ 515 and 533(1) do the job. But the Special Counsel's "plain-text" analysis redrafts both provisions in material ways. He also places extensive reliance on historic practice and predecessor versions of § 515 to aid his redrafting. None of this squares with controlling and settled law. Here, the plain text of §§ 515 and 533(1) does not clearly confer authority to appoint any special counsel, much less one as an inferior officer. *See Concord*, 317 F. Supp. 3d at 620-21. Thus, the analysis not only "begins" with the plain text—it "ends there as well." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018).[1]

[1] In response to Mr. Miller's argument that a clear statement is required to overcome the default method of appointment under the Appointments Clause, the Special Counsel claims the argument was raised "only in a footnote" in Mr. Miller's brief and presumably waived. Govt Br. at 40 n.8. But Mr. Miller expressly asserted the need for a clear statement in the body of his opening brief. *See* Miller Br. at 5 ("clear language"), 7 ("must clearly state"), 8 ("clear and specific statutory authorization"), 14 (similar). His footnote merely cited to authority supporting that proposition. Moreover, in this context, the need for a clear statement is driven by constitutional mandate emanating from the

A. The plain text of §§ 515 and 533(1) provides no authority to appoint the Special Counsel as an inferior officer.

Section 515. Section 515's past-participle, passive-voice references to "appointed" and "retained," coupled with their modification by the phrases "under law" and "under authority" of the DOJ, confirm that the provision confers no power to appoint anyone. This is reinforced by the existence of neighboring statutes that, with their use of the active-voice "appoint" and specific references to "attorneys," "contrast[] sharply" with § 515(b). *United States v. Concord Mgmt. & Consulting LLC*, 317 F. Supp. 3d 598, 621 (D.D.C. 2018).

To achieve his contrary result, the Special Counsel insists on improperly ellipsing and revising the words in § 515. He maintains that § 515 should be read to mean "attorney who **is now** specially retained" or "appointed." Govt Br. at 37 (emphasis added). That rewriting is demonstrably ungrammatical and ignores what this Court recently reiterated—that past participles refer to acts that "took place at some prior time"; "'past or completed action[.]'" *Util. Solid Waste Activities Grp. v. Envtl. Prot. Agency*, 901 F.3d 414, 440 (D.C. Cir. 2018) (citations omitted). Congress knows full well how to give present effect to a past-participle clause—use the "active present tense" word "is," *id.*, which is the precise

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Appointments Clause. That is not waivable. *See UC Health v. NLRB*, 803 F.3d 669, 679 n.5 (D.C. Cir. 2015).

word the Special Counsel now tries to insert into § 515, but which Congress left out.

The Special Counsel claims (at 37) that his "is now" construction "matches the main verbs" in § 515, which are in the present tense. But there is no grammatical compulsion to read "appointed" or "retained" in the present tense simply because other verbs in § 515 are in that tense. Rather, § 515's contrasting use of both active-voice, present-tense verbs and passive-voice past-participles further reinforces that the latter terms refer to already completed past action. *See Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 631 (2012) (giving effect to "Congress's use of different sets of verbs, with distinct tenses"); *In re Sealed Case (Sentencing Guidelines' Safety Valve)*, 105 F.3d 1460, 1463 (D.C. Cir. 1997) (noting significance of contrasting uses of passive and active voice).

The Special Counsel's attempt (at 37) to explain why his reading of § 515's "under law" and "under authority of the" DOJ clauses does not render them surplusage (*see* Concord Br. at 3) is equally unsupported. He wraps his construction in supposed history, but as shown below, history cannot overcome the current text's plain meaning. He also ignores the significance of numerous neighboring provisions that, unlike § 515(b), "do confer the power to appoint in a straightforward manner." *Concord*, 317 F. Supp. 3d at 621, and offers no reason why Congress, despite having amended § 515(b) and its predecessors several

times, declined to follow the "straightforward" structure of the many appointment-power conferring provisions in the 500 series and elsewhere in the Code.

In the end, the Special Counsel's "plain-text" statutory construction of § 515 is nothing more or less than a contravention of basic principles of construction. It charts a path that this Court cannot follow.

Section 533(1). The Special Counsel's purported textual analysis of § 533(1) fares no better. That provision authorizes appointment of "officials," not "officers" or "attorneys," and its use of the term "official" starkly contrasts with the term "officer" in neighboring statutes and other appointment-power conferring statutes. *See Concord*, 317 F. Supp. 3d at 621; Concord Br. at 10. In highlighting this contrast, the *Concord* court cited more than 10 separate neighboring provisions, including provisions in the same chapter as § 533(1), that use the term "officer," but not "official," as well as multiple appointment-power conferring statutes that use the term "officer," not "official." *See Concord*, 317 F. Supp. 3d at 621. Section 533(1) also is located in the chapter titled "FEDERAL BUREAU OF INVESTIGATION," which contains provisions laying out investigatory functions associated with the FBI. Miller Br. at 9; Concord Br. at 11.

Just as with § 515, the Special Counsel's assertion that the plain language of this statute authorizes the appointment of private attorneys as inferior officers is a product of redrafting, not fact. The fact is, "'officer' is a distinct and well-

established legal term[,]" *Concord*, 317 F. Supp. 3d at 621 (citation omitted), and when used—or not used—in a statute that confers appointment power, that is a significant legislative choice.

In addressing the significance of § 533(1)'s reference to "officials" but not "officers," the Special Counsel also does not account for the *Concord* court's analysis or its citation to numerous statutes that use the term "officer." Nor does he acknowledge the significance of the nearby § 534, which likewise refers to the appointment of "officials" for the specific purpose of carrying out investigative functions commonly associated with the FBI. *See Pereira v. Sessions*, 138 S. Ct. 2105, 2115 (2018) ("'[I]t is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.'") (citation omitted).

Instead, the Special Counsel refers (at 39) to case law he claims uses the two words—"officials" and "officers"—interchangeably. But none of those cases construed **statutes** that used the term "official" or even suggested that the statutory term "official" could refer to an inferior officer for Appointments Clause purposes. And certainly none of the Special Counsel's authorities can displace the prevailing interpretive principle that the "'use of different terms within related statutes generally implies that different meanings were intended.'" *United States v. Bean*, 537 U.S. 71, 76 (2002) (citation omitted).

Notably, the Special Counsel does not cite a single statute conferring appointment authority that uses the term "official" in place of "officer." He does cite one statute—18 U.S.C. § 201(a)(1)—which criminalizes bribery of "public officials," and defines "public officials" to include "officers" strictly for purposes of that specific statute. That provision is inapposite because it is neither an appointment-power conferring statute like those cited by the *Concord* court, nor within the 500 series or even remotely related to the chapter of statutes that contains § 533(1).

The Special Counsel then claims "there is no textual hint that Section 533(1) is limited to FBI officials" because it applies to those who "detect and prosecute crimes," and "only attorneys prosecute crime." Govt. Br. at 38, 40. But this ignores that when Congress intends to convey the power to appoint "attorneys," it uses that specific term, *see, e.g.*, 28 U.S.C. §§ 542(a), 543(a), 546(a), yet § 533(1) does not. And the Special Counsel has no answer to for Concord's argument that "prosecute" in § 533(1) does not have the narrow meaning the Special Counsel ascribes to it. Concord Br. at 12.

As for § 533(1)'s placement in the FBI chapter, the Special Counsel asserts (at 39) that the mere "title" of a statute cannot limit its plain meaning. True enough. But the Special Counsel erroneously describes Appellant's (and Concord's) argument, which focuses on the significance of the conscious structural

choice Congress made—placing § 533(1) in the FBI chapter alongside 12 other provisions that clearly are directed at investigative functions commonly associated with FBI agents, but **not** in the succeeding "UNITED STATES ATTORNEYS" chapter. Concord Br. at 10-11. And, as the *Concord* court rightly acknowledged, statutory headings can indeed supply cues as to meaning. 317 F. Supp. 3d at 620. These principles apply with particular force here because § 533(1)'s text was derived from annual appropriations language that appeared for nearly three decades under the heading "FEDERAL BUREAU OF INVESTIGATION" before it was codified in a chapter of the Code bearing the same heading. *Compare* Act of Mar. 22, 1935, ch. 39, tit. II, 49 Stat. 67, 77, *with* Act of Sept. 6, 1966, Pub. L. No. 89-554, § 4(c), 80 Stat. 378, 616 (codified at 28 U.S.C. § 533).

Ultimately, if the Special Counsel is right that both § 515 and § 533(1) confer the power to appoint a Special Counsel as an inferior officer, that contradicts the "'cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant'" of another. *Winder v. Erste*, 566 F.3d 209, 214 (D.C. Cir. 2009) (citation omitted). And there is no apparent reason—and the Special Counsel provides none—why Congress would have enacted § 533(1) to provide the same power supposedly conferred by § 515. In this light and in this case—where fidelity to the Appointments Clause is so imperative—the Special

Counsel's arguments do not come close to establishing that there is a clear textual basis for his appointment as an inferior officer in either statute.

B. The history of § 515 and special-counsel appointments does not, and cannot, provide authority not found in § 515's plain text.

Without any viable textual argument or a single case specifically on point, the Special Counsel cites various pieces of historical evidence—predecessor statutes to § 515(b) and instances where those statutes or the current § 515 were invoked in appointing special counsels. Govt. Br at 41-43. But this offered historical treatise is no substitute for what § 515 presently does—and does not—say. And it does not go nearly as far as the Special Counsel claims.

Where the meaning of a statute's text is clear, no "extra-textual evidence"—including predecessor statutes—should be consulted in determining its meaning. *See Trump v. Hawaii*, 138 S. Ct. 2392, 1412 (2018) (rejecting reliance on "[p]recursor" statutes); *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1288 (D.C. Cir. 2007) ("earlier statutory language cannot trump the current statute's plain import" and rejecting reliance "on the wording of an earlier version of the statute"). The Special Counsel's historical examples cannot supply what the text of § 515 plainly does not either because any supposed "verdict of quiescent years cannot be invoked to baptize a statutory gloss that is otherwise impermissible" based on the statutory text. *Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969); *see also Matal v. Tam*, 137 S. Ct. 1744, 1756 (2017) (rejecting reliance on

agency's historical "enforcement practice"); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (adhering to "plain command" of text "even if doing that will reverse the longstanding practice under the statute") (citation omitted); *Brown v. Gardner*, 513 U.S. 115, 122 (1994)(rejecting argument that interpretation "deserves judicial deference due to its undisturbed endurance for 60 years" because "age is no antidote to clear inconsistency with a statute").

Nor is the Special Counsel's historical evidence on point. He claims that § 515(b)'s predecessor statutes—in particular, § 17 of the 1870 Act—supports his interpretation because there was no other statute extant at the time that provided authority to appoint special counsels. Govt. Br. at 41. But neither § 17 nor subsequent amendments to it are relevant because they did not authorize the appointment of a special counsel **as an inferior officer**. In fact, they refer both to the employment of "attorneys" and the appointment of "officers," Concord Br. at 7-8 n.2, explicitly distinguishing between the two and reflecting Congress's intent that the terms be given different meaning. *See Bean*, 537 U.S. at 76.

In response, the Special Counsel claims (at 41-43) that the history of § 515 shows that the Attorney General had the power to appoint "special counsels." That just begs the question—special counsels as "employees" or special counsels as "officers"? The answer to that question is the former, not the latter. Concord Br. at 7-8 & n.2. The Special Counsel also points (at 43) to Congress's purported

acceptance of the Attorney General's § 515(b) appointment authority. This "congressional acquiescence"—if it can even be called that here—"cannot change the plain meaning of [the] enacted text." *Citizens for Responsibility & Ethics in Washington v. FEC*, No. 18-5261, 2018 WL 4403288, at *3 (D.C. Cir. Sept. 15, 2018) (citations omitted).

As for the Special Counsel's examples of appointments, he provides no context for their particular statutory basis. The closest examples he can muster—the Watergate Special Prosecutors—are most notable for the fact that neither § 515 nor § 533 were cited as authority for their appointments.[2] And none of the examples involved a private attorney given unconstrained discretion to engage in a roving commission without geographic bounds or meaningful oversight, free to investigate anyone—including, without his express consent, the President himself.

In the final analysis, the Special Counsel's interpretation turns statutory construction on its head. He cannot account for the plain statutory text and instead proposes to rewrite it. He has no answer for the surrounding statutory context and structure, essential guides to meaning. His interpretation would render parts of statutes surplusage and the two statutes themselves redundant. And he attempts to salvage all of this by using history as a substitute for the current statutory text. It is

[2] *See, e.g.*, DOJ Order No. 51773, 38 Fed. Reg. 14,688 (June 4, 1973); DOJ Order No. 551-73, 38 Fed. Reg. 30,738 (Nov. 7, 1973); *see also, e.g.*, Final Rule, 59 Fed. Reg. 5321 (Feb. 4, 1994)).

easy to see why the *Concord* court found that properly construed, §§ 515(b) and 533(1) do not authorize the appointment of a private attorney as an inferior officer. This Court should do the same.

C. *Nixon* and *Sealed Case* do not control the statutory-authority issue.

Left with no statutory authority supporting his appointment, the Special Counsel turns to two precedents that he contends bind this Court on the appointment dispute— *United States v. Nixon*, 418 U.S. 683 (1974) and *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987). But neither case is binding authority when the issue is closely examined.

First, all the parties agree that each of the three cases—*Nixon*, *Sealed Case*, and this one—arose on different facts and involved different arguments than those presented to support or challenge the disputed appointment. Neither *Nixon* nor *Sealed Case* therefore can be considered "on point" and "directly controlling" as the Special Counsel claims. *See UC Health*, 803 F.3d at 682 (Edwards, J., concurring) ("[A] judicial decision 'attaches a specific legal consequence to a detailed set of facts'" and "'is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts.'") (internal quotation marks and citations omitted).

Second, given the underlying differences, one must look to the reasoning in the cited cases to divine their precedential effect in this one. On that point, the

Special Counsel cannot, and does not, dispute that *Nixon* offers no reasoning at all on why it was that the cited statutes supported the appointment.

Nevertheless, he calls *Nixon's* observation on Mr. Jaworski's appointment a "holding" essential to the decision and goes even further and says the Supreme Court "expressly addressed" the statutory authority based on its "independent judgment." Govt Br. at 32. But the Supreme Court did no such thing. *Nixon's* reference to §§ 515 and 533 was lifted nearly verbatim from Mr. Jaworski's brief and Mr. Jaworski's position was not disputed by the President. Moreover, without analysis, the Court simply stated that those statutes (and others) conferred authority on the Attorney General to appoint unspecified "subordinate officers" and—erroneously as it turned out—that the Attorney General, "pursuant to those statutes," actually had delegated authority to the Special Prosecutor. 418 U.S. at 694.[3] These are the hallmarks of dicta, not of a binding holding. *See Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974) ("[T]his Court has never considered itself bound" by "prior decisions [that] sub silentio" "assume[]" or "stat[e] without analysis" a legal proposition that was not "squarely raised as a contention in the petitions for certiorari, jurisdictional statements, or briefs") (citations omitted).

[3] As noted above, neither § 515 nor § 533(1) were invoked by the Attorney General or the Acting Attorney General in appointing the Watergate Special Prosecutors.

In these circumstances, this Court had it right in *Sealed Case* when it concluded that *Nixon* simply "presupposed" that the statutes provided the authority for Mr. Jaworski's appointment and *Sealed Case* went on to independently examine the appointment authority on the facts and record before it. In undertaking its analysis, and contrary to the Special Counsel's contention (at 32 n.6), this Court gave no indication that it was bound by *Nixon*, mentioning the case only in a footnote and even then without indicating how *Nixon* was even supportive of its reasoning, much less a dispositive holding on the authority issue. 829 F.2d at 55 n.30.

With nothing behind it but his own *ipse dixit*, the Special Counsel argues (at 31-32) that the Supreme Court in *Nixon* had to resolve the legal basis for Mr. Jaworski's appointment in order to have a justiciable controversy and, therefore, the Court's citation of the various statutes must be considered a holding. But here again, the decision itself gives no indication that that is or must be so. Mr. Jaworski brought the executive privilege question to the Court and the case and controversy was over the scope of the privilege and whether courts could resolve a privilege dispute between members of the Executive branch—not the legality of Mr. Jaworski's appointment, which the President himself invited and did not bring to a head.

Third, with nothing binding in *Nixon* on the facts or the law, that brings this Court to *Sealed Case*. But the differing factual and legal context there provides no basis for panel stare decisis, *see UC Health*, 803 F.3d at 682 (Edwards, J., concurring), and *Sealed Case* was careful to note that it made its decision on the specific record before it. 829 F.2d at 55 & n.29.[4] As for *Sealed Case's* own discussion of § 515,[5] there is nothing dispositive there as applied to this case. Notwithstanding the Special Counsel's assertions, this Court's reasoning and holding as related to Mr. Walsh's appointment hinged on his already being a DOJ employee, not simply a private lawyer. This Court thus found that the various statutes authorized the Attorney General "to delegate such functions and powers to others **within the Department of Justice**." 829 F.2d at 55 n.29 (emphasis added).

Fourth, not only is this Court free to take its own look at the Special Counsel's appointment on this record, the Supreme Court's intervening decision in *Edmond v. United States*, 520 U.S. 651 (1997), provides further incentive to do so. *Edmond* "require[s] statutory language **specifically granting** the head of a department the power to **appoint inferior officers**." *United States v. Janssen*, 73 M.J. 221, 224 (C.A.A.F. 2014) (emphasis added). That specific appointment

[4] The Special Counsel suggests (at 34) that in *Sealed Case*, Mr. North challenged the Attorney General's statutory authority to make Mr. Walsh's parallel appointment. That is false. *See* Concord Br. at 19-20.
[5] *Sealed Case* does not mention § 533.

authority is exactly what is missing here, and this Court should find that the Special Counsel's appointment is unlawful under the Appointment Clause.

II. The Special Counsel Is A Principal Officer

A. The Special Counsel possesses extraordinary governmental powers

The Special Counsel does not dispute his extraordinary power and that wielded by other federal prosecutors: "'[t]he prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous.'" Mem. Op. at 2 (quoting Robert H. Jackson, The Federal Prosecutor, Address at Conference of United States Attorneys (Apr. 1, 1940)); *see also In re Sealed Case*, 838 F.2d 476, 487 (D.C. Cir. 1987) ("Authority to prosecute an individual is that government power which most threatens personal liberty * * * * The Framers of the Constitution were justly fearful of this power.").

Nor does he dispute the historical practice since 1789 that all U.S. Attorneys were appointed by the President with the consent of the Senate, and thus regarded as principal officers appointed under the default clause of the Appointments Clause. The Special Counsel speculates that this practice may have been due to the fact that it was not until 1861 that the Attorney General was given the authority to supervise them, and presumably the U.S. Attorneys reverted to inferior officers. Govt. Br. at 22 n.3. This speculation runs counter to the consistent historical practice reflecting the Framers' understanding that such an appointment process

was required of such powerful officers, and that its subsequent codification of in 28 U.S.C. § 541(a) was intended to conform with the Constitution. *See* Miller Br. at 15-18.

The Special Counsel also relies on 28 U.S.C. § 546, which, in the rare case of vacancies, authorizes courts or the Attorney General to appoint U.S. Attorneys. This, he claims, means they must be inferior officers. Govt. Br. at 22 n.3. However, this is just the exception that proves the rule that Senate confirmation is required.

The cases dealing with interim appointments of U.S. Attorneys cited by the Special Counsel (at 21) also are not persuasive. *United States v. Hilario*, 218 F.3d 19 (1st Cir. 2000) and *United States v. Gantt*, 194 F.3d 987 (9th Cir. 1999), focused only on the extent to which U.S. Attorneys are hierarchically subordinate to the Attorney General. *Gantt*, 194 F.3d at 999; *Hilario*, 218 F.3d at 26. If taken as a broad generalization, that is flatly untrue because it is grounded in the officer's location and ignores the scope of the power exercised by the officer.

Gantt based its conclusion on *Edmond v. United States*, 520 U.S. 651 (1997), which stated that "[w]hether one is an 'inferior' officer depends on whether he has a superior…. '[I]nferior officers' are officers whose work is directed and supervised at some level by others who are principal officers." 194 F.3d at 999. But if that were the test, then all officers below the Attorney General, including the

Deputy Attorney General, Solicitor General, and Assistant Attorneys General, as well as all other sub-cabinet positions in the other departments, would all be classified as "inferior officers," leading to the implausible conclusion that the Framers intended that only Heads of Departments are to be principal officers, and maybe not even them. *See In re Sealed Case*, 838 F.2d at 482 ("Having specially provided that the President 'shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... all other Officers of the United States, whose Appointments are not herein otherwise provided for,' it is implausible to suggest that the Framers intended that no officers, even heads of departments, had to be appointed in this fashion.").

Justice Souter recognized this problem in his concurring opinion in *Edmond* when he said "[i]t does not follow, however, that if one is subject **to some supervision and control**, one is an inferior officer. Having a superior officer is necessary for inferior officer status, but not sufficient to establish it." *Id*. at 667 (Souter, J., concurring in part and concurring in the judgment) (emphasis added). The same was true in *Morrison v. Olson*, 487 U.S. 654 (1988). The Court there found that the independent counsel was an inferior officer, relying on a combination of considerations involving both the counsel's degree of independence and the scope of the counsel's duties and functions. *See* Miller Br. at 18. Special Counsel Mueller is different across both dimensions. *Id.* at 17-23

(discussing the applicability of *Morrison* and *Edmond*).[6] In short, there is no doubt that the significance of this authority is a "metric on which the [Special Counsel] scores high." *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1337 (D.C. Cir. 2012). If setting royalty rates "can obviously mean life or death for firms," *id*. at 1338, then returning indictments, criminal prosecution, convictions, and incarceration can mean "life, liberty, and reputation," a far more serious consequence. Accordingly, this level of authority strongly supports the Special Counsel's principal-officer status.

B. The Special Counsel's decision-making is not subject to "substantial supervision and oversight."

As demonstrated in Miller's opening brief, the Special Counsel enjoys wide discretion to conduct his investigation, issue subpoenas, return indictments, obtain plea bargains, and prosecute defendants. Miller Br. at 22. While he must follow Department policies and is subject to mundane administrative, personnel, and budgetary policies, the Special Counsel is under no obligation to get approval from the Acting Attorney General before taking any action. At most, he may choose to

[6] The Special Counsel mistakenly relies (at 29) on *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987), which involved Independent Counsel Lawrence Walsh. This Court's decision there pre-dated the now-prevailing principal-officer precedents—namely *Edmond* and *Intercollegiate*—and rested both on an outmoded 1898 Supreme Court decision, as well as the Attorney General's authority under 28 U.S.C. § 510 to "delegate" his authority to **current** Justice Department employees such as Mr. Walsh. *Id.* at 57 & n.34. The Special Counsel here indisputably was not a DOJ officer or employee at the time of his appointment.

consult with the Acting Attorney General who is required to "give great weight" to the Special Counsel's proposed actions. 28 C.F.R. 600.8. As Judge Friedrich noted, it is "unclear" under what circumstances the Special Counsel's actions can be countermanded. Miller Br. at 21. In short, supervision is at best minimal and certainly not on the level of "substantial."

To prove that "in fact, supervision under the regulations has occurred," the Special Counsel ironically points to the *expansion* of his authority by the Acting Attorney General in light of sharp criticism by Judge T.S. Elllis who didn't "see what relation this [Manafort] indictment has with anything the special counsel is authorized to investigate." Miller Br. at 20, n.7. Indeed, there appears to be another factor counseling against greater control of the Special Counsel. The Acting Attorney General has been reported to be upset that the President used his Memorandum recommending the firing of FBI Director Comey for his mishandling the Hillary Clinton email matter as a pretext to remove Director Comey from this very investigation.[7] Also concerning was the issuance of indictments against Russian intelligent officers on the eve of the U.S.-Russia Summit. Mark Mazzetti and Katie Benner, 12 Russian Agents Indicted in Mueller Investigation, N.Y. Times (July 13, 2018).

[7] Michael S. Schmidt and Adam Goldman, *'Shaken' Rosenstein Felt Used by White House in Comey Firing*, New York Times (June 29, 2018). https://www.nytimes.com/2018/06/29/us/politics/rod-rosenstein-comey-firing.html

https://www.nytimes.com/2018/07/13/us/politics/mueller-indictment-russian-intelligence-hacking.html. The "presumption of regularity" the Special Counsel asks this Court to accept in characterizing his actions (at 15), is a rebuttable one in light of these public actions. Thus, if there is any control or supervision over the Special Counsel, it "is likely to be quite faint." *Intercollegiate*, 684 F.3d at 1339.

C. The Special Counsel has authority to make final decisions.

The Special Counsel does not dispute Miller's assertion that the regulations "nowhere require the Special Counsel to seek approval or get permission from the [Acting Attorney General] before making final decision about who to investigate, indict, and prosecute." Miller Br. at 22. Moreover, just like the final decisions made by Copyright Royalty Judges, the Special Counsel's final decisions are "subject to reversal or change only when challenged in an Article III court." 684 F.3d at 1340. Instead, the Special Counsel compares his prosecutorial power and unilateral decision-making authority to United States commissioners "who could issue warrants for the arrest and detention of defendants" before setting bail, and who are classified as "inferior officers." Govt. Br. at 21 (citing *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 353 (1931)). The comparison falls woefully short. United States commissioners are "mere officer[s] of the district court in proceedings of which that court had authority to take control at any time," 282 U.S.

at 354, and arrest warrants issued are requested by authorized law enforcement personnel.

D. Removability "for cause" and revocation of regulations

As Judge Friedrich explained at length, the Special Counsel's protection under the regulations from being removed except for "good cause" and similar conduct suggests that the Special Counsel is a principal officer. *Concord*, 317 F. Supp. 3d at 613-14; Miller Br. at 23. Both Judges Friedrich and Howell as well as the Special Counsel assert that since the regulations purportedly can theoretically be revoked immediately, then the Acting Attorney General can exercise unfettered supervision over the Special Counsel and remove him at will. Miller submits that such hypothetical revocation of the regulations is legally irrelevant in determining the actual effect of those regulations in the here and now. Miller Br. at 24.

Moreover, it is the Attorney General rather than the so-called Acting Attorney General who has the authority to revoke them. The regulations are Department-wide for all special counsels, current and future ones, and not just applicable to this Special Counsel. While the DAG may have some supervisory power over Special Counsel Mueller under these regulations, he is not empowered to revoke them. Attorney General Sessions' recusal only extended to his involvement in the ongoing investigation; it did not constitute an abdication of his duties as the Attorney General to promulgate or revoke agency-wide regulations;

nor did he delegate any such powers under 28 U.S.C. 510. Just as Attorney General Janet Reno promulgated the Special Counsel regulations in 1999, if they are able to be modified or revoked, it must be done by Attorney General Sessions regardless of his recusal in the ongoing investigation. The fact that the only individual who can revoke or modify the Special Counsel regulations – the Attorney General – has formally indicated that, due to his refusal, he cannot supervise or dismiss the Special Counsel, further magnifies the extent to which Special Counsel is not effectively supervised by anyone within the Executive Branch.

In any event, unlike the statutory "for cause" provision in *Morrison*, the "for cause" removal provision here is set forth in the DOJ-issued regulations, which were promulgated without even a notice-and-comment process, thus fostering an imprecise and accountability-destroying self-insulation. This is anathema to our constitutional architecture and the rule of law.[8] It renders unconstitutional the Special Counsel appointment and all of his actions.

[8] This point, albeit not its constitutional implications, was acknowledged by Chief Judge Howell. "To be sure, the Attorney General might incur a significant *political* cost for rescinding the regulations to exercise greater control over, or remove without cause, the Special Counsel. Such reputational harm to the Attorney General is cognizable only in the court of public opinion, not a court of law. The fact that a public official might get egg on his face for making an unpopular decision is a feature, not a bug, of a constitutional system designed

III. The Appointments Clause Required that the Special Counsel Be Appointed As An Inferior Officer by the "Head of the Department"—the Attorney General

The Special Counsel argues that if the Deputy Attorney General (DAG) lacked the authority to appoint him as an inferior officer, it "would mean that, in cases of recusal, no law places the Deputy Attorney General atop the Department of Justice, acting as the head of the Department" and that "it is necessary that someone head the Department for that investigation." Govt. Br. 45, 50. That is both incorrect and begs the question. For purposes of the Appointment Clause, Jeff Sessions was and continues to be the head of the Justice Department, not the DAG.

The Attorney General's subsequent recusal was only for purposes of overseeing the Russia *investigation* that began in 2016; it did not disable him as the Head of the Department under the Appointments Clause from appointing the Special Counsel as the *investigator* (assuming such statutory authority existed) or from exercising any of his other duties or powers as the Attorney General,

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around 'the accountability of [public] officials.'" Mem. Op. at 30, n.13 (emphasis in original) (quoting *New York v. United States*, 505 U.S. 144, 168 (1992)).

However, this possibility of reputational harm should the regulations be revoked actually cuts the other way. Precisely because any attempt to limit or remove the Special Counsel will generate public outcry, there is every incentive not to exercise effective control over his conduct, particularly where, as previously noted, there is apparent animus by the DAG against the President.

including whether or not to revoke the Special Counsel regulations. In short, the DAG did not have the constitutional authority to appoint the Special Counsel even if the DAG otherwise had supervisory authority over the investigation, either in assuming the role as the Acting Attorney General -- as the Special Counsel asserts he could so under 28 U.S.C. 508 ("Vacancies") -- or if the Attorney General had formally delegated authority to the DAG to do so under 28 U.S.C. 510 ("Delegation of Authority"), an alternative argument proffered by the district court below (Mem. Op. at 90-93) but which the Special Counsel did not raise in his brief, and therefore waived it.

1. With no case law or regulation interpreting "disability" in Section 508 as a single-issue recusal, the Special Counsel cites a few cases interpreting "disability" as used in Rule 25 of the Federal Rules of Criminal Procedure to encompass judicial recusals. But he has no answer to the more relevant decisions that such recusals cannot divest a judge from exercising his or her constitutional duty under the Rule of Necessity to decide the case.[9]

[9] *See* Miller Br. at 41 citing *In re Leefe*, 2 Barb. Ch. 39 (N.Y. Ch. 1846) (state *constitution* required that the chancellor alone hear appeals from inferior equity tribunals, and thus decide the case at hand involving a relative). A more apt comparison in the judicial context would arise if there were a law requiring the Chief Judge of a district court to assign a case to another judge where the originally assigned judge was recused from the case. If the Chief Judge herself had a conflict in a case originally assigned to her, she would still have the authority and duty to "appoint" another sitting judge to hear the case and still be true to her recusal by not deciding the case.

2. More relevant is *Moog v United States,* No. MISC. CIV-90-215E, 1991 WL 46518 (W.D.N.Y. Apr. 1, 1991), which rejected the government's position:

> It is readily apparent that [Section 508(a)] contemplates **a complete inability of the Attorney General to perform his duties, such that the Deputy Attorney General must step in and exercise "all the duties of that office."** Were the statute construed as the respondent urges, every conflict of interest on the part of an Attorney General would require his deputy to assume all the duties of office, clearly a nonsensical result.
> *Id*. at *2 (emphasis added).

In response, the Special Counsel argues: "Section 508(a) provides only that the Deputy Attorney General "may" exercise those duties. 'The permissive term 'may' means that the DAG *need not* assume all of the Attorney General's duties where only a limited conflict of interest exists.' [citing Mem. Op. at 89.]" Govt. Br. at 48 (emphasis added). But if that were true, nothing would preclude the DAG from assuming powers that he otherwise would not have outside the confines of the recusal, such as revocation of the Special Counsel regulations that only the Attorney General has the authority to do.[10] In any event, the permissive "may" is not the official position of the Justice Department. The pertinent regulation is 28 C.F.R. 0.137 which states:

> (a) In case of vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General **shall**, pursuant to 28 U.S.C. 508(a) perform the functions and duties of and act as Attorney General. (emphasis added).

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[10] See discussion, *supra*, at 21.

Moog was thus correctly decided. The Special Counsel responds that "the only other court to consider this precise question *appeared* to agree." Govt. Br. at 49 (citing *United States v. Libby*, 429 F. Supp. 2d 27, 31 (D.D.C. 2006)) (emphasis added). But as Chief Judge Howell observed, *Libby* only "*appears to have assumed* rather than concluded that [508(a)]" authorizes the Deputy to be an Acting AG in a single-recusal situation and further observed that *Libby* provides "little additional clarity" to the meaning of Section 508(a) with respect to recusals. Mem. Op. at 88 (emphasis added).

3. Finally, the Special Counsel relies on a two-sentence footnote in an OLC opinion (Govt. Br. at 49, citing 8 Op. O.L.C. 252, 255 n.3) summarily concluding that a single-issue recusal by the Attorney General constitutes a disability under 28 U.S.C. 508. Yet again, the Special Counsel ignores the more relevant OLC Opinion cited in Miller's Brief at 43 stating in pertinent part:

> [A]t a minimum [the Framers] support the view that a head of a department may use subordinates to carry out appointments **so long as the appointment is submitted to the head of the department for approval and made in the name of the head of the department, upon whom ultimate political accountability must rest.**"

29 Op. O.L.C. at 135-36 (emphasis added).

This did not happen here. Accordingly, the Special Counsel's appointment other than by Attorney General Jeff Sessions violated the Appointments Clause.

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CONCLUSION

For the foregoing reasons, and those in Mr. Miller's Opening Brief and Concord's amicus brief, the judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to FRAP 25(d), the undersigned hereby certifies that on the 9th day of October, 2018, he caused the foregoing Reply Brief of Appellant Andrew Miller to be filed electronically with the Clerk of the Court by using CM/ECF system. The participants in this case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

The undersigned further certifies that the foregoing Brief of Appellant complies with FRAP 27(d)(2)(A) and contains 6,471 words, as determined by Microsoft Word 2010 and complies with FRAP 32(a) (5)-(6) because it has been prepared with proportionally spaced font typeface using Microsoft Word 2010 in 14-point Times New Roman.

/s/Paul D. Kamenar
Paul D. Kamenar